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ELECTRONIC FRONTIER FOUNDATION, )  
 )  
 ) Case No. 10-cv-4892-RS  
 )  
 ) Plaintiff, )  
 ) **JOINT CASE MANAGEMENT**  
 ) **CONFERENCE STATEMENT AND**  
 ) **[PROPOSED] ORDER SETTING**  
 ) **BRIEFING SCHEDULE**  
 )  
 ) v. )  
 )  
 ) DEPARTMENT OF JUSTICE, )  
 )  
 )  
 ) Defendant. )  
 ) Judge: Hon. Richard Seeborg  
 ) Date: November 17, 2011  
 ) Time: 10:00 a.m.  
 ) Place: Telephonic Appearance

Pursuant to the Northern District of California Standing Order and this Court's March 3, 2011 Order (Dkt. No. 27), the parties submit this Joint Case Management Conference Statement. The parties conferred on November 7, 2011 regarding the subjects identified in the Standing Order and their joint response is set forth below.

## **I. Information Requested by Standing Order**

### **1. Jurisdiction and Service**

The case was filed on October 28, 2010. (Dkt. No. 1.) All Defendants have been served. Plaintiff contends that this Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). Plaintiff also contends that this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

### **2. Facts**

Plaintiff is the Electronic Frontier Foundation. Defendant is the Department of Justice and, specifically, its components the Criminal Division ("CRM"), Drug Enforcement Agency ("DEA"), and Federal Bureau of Investigation ("FBI").

In a letter dated May 21, 2009 and sent by facsimile to the FBI, Plaintiff requested under the FOIA all agency records, including electronic records, from 2007 to the present concerning the FBI's Going Dark Program.

In letters dated September 28, 2010 and sent by facsimile to Defendant DOJ's components, including CRM, FBI and DEA, Plaintiff requested under the FOIA records created on or after January 1, 2006 concerning the agencies' efforts to push for changes to federal surveillance law that would require communications providers to build in mechanisms that would provide the government additional capabilities to intercept Americans' communications.

On March 3, 2011, the parties agreed on a schedule for review and production of documents responsive to Plaintiff's FOIA requests. The components' processing and production of responsive records are discussed in Section 7 below.

### **3. Legal Issues**

This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for

1 injunctive and other appropriate relief. Plaintiff seeks the expedited processing and release of  
2 records that Plaintiff requested from Defendant Department of Justice and its components,  
3 Federal Bureau of Investigation, Drug Enforcement Agency, and Criminal Division, concerning  
4 the agency's efforts to push for changes to federal surveillance law to ensure that all services that  
5 enable communications be technically capable of complying with a wiretap order. Plaintiff  
6 asserts that the requested records concern a matter about which there is "[a]n urgency to inform  
7 the public about an actual or alleged federal government activity," and were "made by a person  
8 primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R.  
9 § 16.5(d)(1)(ii).

#### 10 **4. Motions**

11 On January 6, 2011, Plaintiff filed a motion for partial summary judgment seeking  
12 expedited processing of its September 28, 2010 FOIA request along with an order requiring that  
13 processing be completed of all materials responsive to both its May 21, 2009 and September 28,  
14 2010 FOIA requests within 10 days of the Court's order. (Dkt. No. 16.) Defendant filed its  
15 opposition on January 25, 2011, (Dkt. No. 19), and Plaintiff filed its reply on February 3, 2011  
16 (Dkt. No. 20).

17 On February 17, 2011, a hearing on Plaintiff's motion for partial summary judgment was  
18 held before the Court. Following the hearing, the Court issued an order on February 17, 2011  
19 (Dkt. No. 22) instructing the parties to meet and confer in an effort to negotiate a mutually  
20 acceptable processing schedule. On March 3, 2011, after the parties agreed on a processing  
21 schedule, the Court denied Plaintiff's motion without prejudice.

22 The parties anticipate this case will be resolved on cross motions for summary judgment  
23 and intend to file those according to the schedule laid out below in Section 17.

#### 24 **5. Amendment of Pleadings**

25 Neither party anticipates amending the pleadings.

#### 26 **6. Evidence Preservation**

27 As this is an action under the FOIA and discovery is rarely used, the parties have not

1 discussed evidence preservation.

2 **7. Disclosures**

3 CRM and DEA contend that they have now completed the processing of documents  
4 responsive to Plaintiff's September 28, 2010 request. The FBI contends that it has substantially  
5 completed the processing of documents responsive to Plaintiff's FOIA requests and anticipates  
6 completing the processing of all remaining responsive documents, and the production of any  
7 remaining responsive and non-exempt documents to Plaintiff, by the week of November 21,  
8 2011. The parties expect to provide the court with more detailed information about the number of  
9 documents processed and released prior to the November 17, 2011 case management conference.

10 **8. Discovery**

11 The parties do not anticipate conducting discovery in this case.

12 **9. Class Actions**

13 This case is not a class action.

14 **10. Related Cases**

15 There are no related cases.

16 **11. Relief**

17 EFF seeks injunctive relief with respect to the release and disclosure of all records  
18 responsive to its May 2009 and September 2010 FOIA requests. EFF also seeks reasonable  
19 attorney's fees incurred in this litigation.

20 **12. Settlement and ADR**

21 The parties have not yet been able to identify a mutually acceptable basis upon which to  
22 settle this case and currently do not believe ADR would be helpful.

23 **13. Consent to Magistrate**

24 Defendant declined to proceed before a Magistrate Judge.

25 **14. Other References**

26 The parties do not anticipate needing other references.

**15. Narrowing of Issues**

The parties are currently discussing ways to narrow the issues.

**16. Expedited Trial Procedure**

The parties anticipate this case will be resolved on summary judgment and do not anticipate a trial.

**17. Scheduling**

The parties propose the following schedule for summary judgment briefing:

February 2, 2012	Defendant files Motion for Summary Judgment
March 1, 2012	Plaintiff files Cross Motion and Opposition
March 15, 2012	Government files Cross Opposition and Reply
March 29, 2012	Plaintiff files Reply
April 12, 2012	Hearing on Cross Motions

**18. Trial**

The parties anticipate this case will be resolved on summary judgment and do not anticipate a trial.

**19. Disclosure of Non-Party Interested Entities or Persons**

There are no non-party interested entities or persons involved in this case.

A proposed Order embodying this agreement and the proposed schedule is below.

**II. Stipulated Briefing Schedule**

This matter came on for a status hearing before the Court on November 17, 2011. In preparation for the status hearing, the parties have conferred and agreed to a schedule for summary judgment briefing. The parties jointly request that the Court adopt the parties' proposed schedule.

Defendant DOJ and its components DEA, DOJ Criminal Division  
and FBI move for summary judgment.

February 2, 2012

Plaintiff files opposition and cross-moves for summary judgment.

March 1, 2012

Defendant files reply and opposition to Plaintiff's motion. March 15, 2012  
Plaintiff files reply in support of motion for summary judgment. March 29, 2012  
Hearing on cross motions. April 12, 2012

DATED: November 10, 2011

Respectfully submitted,

/s/ Jennifer Lynch  
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DATED: November 10, 2011

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*Attorneys for Defendant*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 10, 2011, I caused a copy of the foregoing to be served  
on counsel for Defendant via the Court's ECF system.

/s/ Jennifer Lynch  
JENNIFER LYNCH

**GENERAL ORDER NO. 45(X) CERTIFICATION**

I attest that I have obtained the concurrence of Nicholas Cartier, counsel for Defendant, in the filing of this document.

/s/ Jennifer Lynch  
JENNIFER LYNCH

PURSUANT TO STIPULATION, **IT IS SO ORDERED.**

Dated: \_\_\_\_\_

\_\_\_\_\_  
Hon. Richard Seeborg  
United States District Judge